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Subject: Professional Licensing in Utah

Professional licensing is established to protect the public and to enhance commerce. In the United States policy experts are evaluating professional licensing laws and whether licensing can better accomplish its objectives. This briefing provides some background on licensing in Utah, explains recent national responses to professional licensing, and summarizes various efforts in Utah to reduce the regulatory burdens of professional licensing. This memo is not intended to cover all efforts or activities surrounding professional licensing, but to highlight some key activities and efforts.

Background – Utah’s Professional Licensing Laws

Licensing Authority. Licensing is a state authority to protect the public health, safety, and welfare. Licensing is created by state legislatures to address a real or perceived market failure in various areas of commerce. While the concepts of lesser forms of regulation like registration and certification have arisen over the past few years, most professional regulation in Utah and other jurisdictions is accomplished with a license: defining a scope of work, requiring a license to provide that service to the public, establishing requirements or competencies to qualify for the license, and investigating complaints against licensees.

In most states licensing boards are given autonomous authority to set fees, hire staff, and adopt rules and policies. Utah is among the minority of states where licensing of most professions is housed under an “umbrella” agency in the Executive Branch, within the control of the Governor. This uniqueness was very important in a recent, highly-publicized United States Supreme Court case, explained below.

Utah’s Licensing Agencies. Many professions in Utah are licensed under the Department of Commerce, Division of Occupational and Professional Licensing (DOPL), though many are not. DOPL houses 51 licensing boards that regulate more than 60 professions. Some examples of non-DOPL professional licensing authorities in Utah include the following:

- Department of Agriculture (various agricultural licenses and pest control applicators)
- Department of Commerce (real estate and securities)
- Courts (attorneys)
- State Board of Education (school teachers)
- Department of Environmental Quality (various certifications)
- Department of Financial Institutions (banks, credit unions, and other entities)
- Department of Health (healthcare facilities and EMTs)
- Department of Human Services (foster care and adoption agencies)
- Insurance Department (insurance agents and companies)
- Department of Public Safety (private investigators and POST law enforcement officers)
- Department of Workforce Services (child care licensing)

National Responses to Professional Licensing

2015 United States Supreme Court Case. Scrutinizing the expansion of professional licensing has been a concern outside of Utah. For example, the Federal Trade Commission (FTC) seeks instances when state professional licensing regulations deviate from public health, safety and welfare efforts toward industry protectionism.

In a landmark case ruling issued in March 2015, the United States Supreme Court agreed with the FTC that the North Carolina Board of Dental Examiners' effort to shut down all non-dentist teeth whitening in the state was focused on protectionist goals without legal justification or true public protection. In the case, the constitutional principle of unrestricted interstate commerce overcame the state's authority to regulate the activity. The court, which had previously deferred to state legislatures in evaluating the public necessity of a licensing law, changed its doctrine in response to questionable actions by the Board.

Specifically, the court ruled that licensing board decisions are only defensible for purposes of immunity from anti-trust violations if either (1) the Board is comprised of a majority of members who are not active market participants; or (2) the board is comprised of a majority of active market participants, but is advisory or has all of its decisions reviewed by an agency or official that is not an active market participant. Utah's structure, though unique and often derided prior to the ruling, sat squarely in line with the model the court viewed would safeguard against from protectionist regulations enacted by the boards. Utah's model includes the valuable professional expertise of each profession in the regulation of that profession, without the perception or fear of industry protectionism.

2015 White House Council of Economic Advisors Report. In July 2015, the White House Council of Economic Advisors issued a report on professional licensing. The report stated six findings that summarize well the benefits and concerns of professional licensing:

- Occupational licensing has grown rapidly over the past few decades
- When designed and implemented carefully, licensing can benefit consumers through higher quality services and improved health and safety standards
- But by making it harder to enter a profession, licensing can also reduce employment opportunities and lower wages for excluded workers, and increase costs for consumers
- Licensing requirements vary substantially by State, creating barriers to workers moving across state lines and inefficiencies for businesses and the economy as a whole
- The costs of licensing fall disproportionately on certain populations
- Best practices in licensing can allow States, working together or individually, to safeguard the well-being of consumers while maintaining a modernized regulatory system that meets the needs of workers and businesses

Many of the report's recommendations were already progressing or are now progressing in Utah. (https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf)

NGA, NCSL, CSG Occupational Licensing Policy Learning Consortium. The National Conference of State Legislatures, National Governors Association, and Council of State Governments, with assistance from the US Department of Labor, are sponsoring the Occupational Licensing Policy Learning Consortium. The Consortium will:

- improve the understanding of occupational licensure issues among the up to 10 participating states by providing a forum for the selected state team members and the expanded stakeholder group to learn about occupational licensing best practices;
- become familiar with and discuss the existing licensing policies in their state;
- identify current policies that create unnecessary barriers to labor market entry, especially for military families, immigrants, people with criminal records and unemployed or dislocated workers; and
- create an action plan that focuses on removing barriers to labor market entry and improves portability and reciprocity for select occupations.

Utah has applied for participation in the Consortium, with letters of support from the Governor, Speaker of the House, President of the Senate, Executive Director of the Department of Commerce, and Executive Director of the Department of Workforce Services. For more information visit <http://www.ncsl.org/research/labor-and-employment/request-for-applications.aspx>. The participating states will be announced September 29th.

Utah Responses to Professional Licensing

Scrutiny and Review of Professional Licensing – OPLR Committee. Over the past couple of decades, the Legislature has determined that the creation of licenses should be scrutinized. In the 1990s, the Occupational and Professional Licensure Review (OPLR) Committee was created with two primary duties: review the creation of licenses *before* they are created, and review *existing* licenses and regulations. Until recently, most new professional licenses adopted by the Legislature were not reviewed by the OPLR Committee. The OPLR Committee structure, duties, and review criteria have all been addressed in recent sessions.

Governor Herbert’s Directives. For many years, the Department of Commerce has been operating under the Governor’s directive to “reduce unnecessary business regulation.” While the Executive Branch doesn’t have the authority to change the statute, DOPL staff continually work with licensing boards, professional associations, and others to ensure administrative rules and policies do not unduly hinder commerce. Whenever a proposed regulation is considered within the Executive Branch, it is scrutinized from beginning to end.

Any discussion of reducing licensing regulatory burdens needs to first include a discussion of reducing administrative and operational burdens. For nearly five years, the Department of Commerce has implemented Governor Herbert’s SUCCESS goals of operational excellence. With limited tax revenues and increasing demands on the limited resources, agencies have been asked to exert substantial efforts to operate innovatively and set high goals to reduce regulatory burdens. In the Department of Commerce we have worked on two primary licensing goals:

- **Issue licenses more quickly, to assist companies and those seeking to work to begin lawfully working as soon as possible.** When we began the SUCCESS initiative in 2013, 48% of DOPL’s licenses were issued within 7 days. Now 72% of our licenses are issued within 7 days. Nearly all renewal licenses are issued immediately. Most other states—with higher licensing fees and larger staffs—take far longer to issue licenses.

- **Resolve investigations more quickly.** More than 80% of DOPL's investigations are completed within 90 days. When cases are resolved quickly, the burdens of compliance are reduced for businesses and license holders.

Both of the SUCCESS goals support the Governor's directive to reduce unnecessary regulation. Not only to people get to work more quickly, but DOPL's limited resources are shifted away from the compliant majority to target those individuals who defraud or otherwise harm Utah's consumers.

Recent Utah Efforts to Protect the Public without Unnecessarily Harming Commerce. The Legislature has passed and the Governor has signed numerous pieces of legislation in recent years modifying licensing laws in ways that reduce professional licensing burdens. A few examples from the 2017 legislative session are highlighted below:

- HB 313, Representative Mike Schultz, eliminated the experience and exam requirement for most contractor licenses, called "specialty" contractor licenses. Sixteen of the top twenty most regulated Utah professions recently identified in a national report were specialty contractor licenses. Exam and experience requirements were the largest obstacles to licensure.
- HB 94, Representative Brian Greene, enhanced the authority of the OPLR Committee to review regulations, both existing and proposed for all occupations and professions. Prior to HB94, the OPLR Committee only reviewed professions within DOPL if the Committee chose to review them. The law now mandates a review of all occupations and professions every 10 years. It also strengthens the criteria for reviewing each profession considered for regulation.
- SB 172, Senator Todd Weiler, modified the scope of practice of barbers to permit brief massages. While the change in policy seems insignificant, it was identified by a DOPL investigator who didn't think the practice was causing harm. DOPL staff focus on behaviors causing harm.
- Four licensing compacts have been adopted by the Legislature and signed by Governor Herbert during the past three sessions, including three in the 2017 session. Compacts are avenues to both simplify licensing regulation and increase worker mobility, while maintaining state authority.
- Utah was one of the first states to take a broad view of telehealth practice in its statutes and rules. So long as practitioners are meeting the standard of care, the mode used to service patients is not an issue. The Legislature and Governor have facilitated the practice even more this year, passing two telehealth bills in the 2017 session.

Conclusion

As stated in the White House report, "When designed and implemented carefully, licensing can benefit consumers through higher quality services and improved health and safety standards." But since licensing is affecting a greater number of workers in the United States than ever before, it is appropriate to review it regularly and determine which regulations truly protect the public and enhance commerce.